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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 536

CAROLINE MOSS, aka GIGI MARTINE,

Petitioner,

vs.

CALIFORNIA,

Respondent.

Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

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TOPICAL INDEX

PAGE

I.

Citation to opinion below 1

II.

Jurisdiction 2

III.

Questions presented 2

IV.

Raising of federal questions below 7

V.

City ordinances, state statutes and state constitutional provisions involved 9

VI.

Statement 9

VII.

Reasons for granting the writ 12

VIII.

Conclusion 27

IX.

Prayer 28

Appendices:

Appendix A. City ordinances, state statutes and state constitutional provisions ..... App. p. 1

Appendix B. Judgments below ..... App. p. 10

TABLE OF AUTHORITIES CITED

CASES

Joseph Burstyn, Inc. v. Wilson, 343 U. S. 495 16

People v. Wepplo, 78 Cal. App. 2d 959 24

Roth v. United States and Alberts v. California, 354 U. S. 476 ..... 2, 3, 4, 12, 13, 15, 18

Smith v. California, 361 U. S. 147 ..... 3, 23

Superior Films v. Dept. of Education, 346 U. S. 587 16

Tolman v. Underhill, 39 Cal. 2d 708 24

Winters v. New York, 333 U. S. 507 ..... 4, 21

Zenith International Film Corp. v. City of Chicago, 291 F. 2d 785 ..... 15, 19

DICTIONARY

Webster's New International Dictionary (2d Ed.) 22

STATUTES

California Constitution, Art. XI, Sec. 11 ..... 9, 23, 24, 27

Los Angeles Municipal Code, Sec. 11.00(m) 9, 21

Los Angeles Municipal Code, Sec. 41.00 ..... 9, 22

Los Angeles Municipal Code, Sec. 41.01.1 ..... 9, 23

Los Angeles Municipal Code, Sec. 41.02 ..... 20, 23

Los Angeles Municipal Code, Sec. 41.02(a) ..... 4, 9, 20, 22, 23 ..... 2, 3, 4, 5, 9, 10, 20, 21, 22, 23, 27

Los Angeles Municipal Code, Sec. 41.02(b) .....

Penal Code, Sec. 311 ..... 9, 23, 24

Penal Code, Sec. 311(1) 24

Penal Code, Sec. 311(2) 5, 10, 20, 23, 25

Penal Code, Sec. 647 10

Penal Code, Sec. 647(5) 9

PAGE

Penal Code, Sec. 950 9

Penal Code, Sec. 952 9

Penal Code, Sec. 1004 ..... 7, 9

Penal Code, Sec. 1181(2) 9

Penal Code, Sec. 1181(3) 9

Penal Code, Sec. 1181(4) 9

Penal Code, Sec. 1181(5) 9

Penal Code, Sec. 1181(6) 9

Penal Code, Sec. 1181(7) 9

Penal Code, Sec. 1185 9

United States Code, Title 28, Sec. 1254(3) 2

United States Constitution, First Amendment 2, 3, 4, 16, 18, 21, 27

United States Constitution, Fourteenth Amendment 2, 3, 4, 5, 6, 7, 8, 16, 21, 24, 25

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Petition for Writ of Certiorari to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

Petitioner prays that a Writ of Certiorari issue to the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. Said Appellate Court on July 31, 1961 affirmed the Trial Court without written opinion. On August 11, 1961 said Appellate Court denied Petition for Rehearing. The Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles is the Court of last resort in the State of California for this case.

I.
Citation to Opinion Below.

No opinion, written or oral, was rendered by the aforementioned Appellate Department of the Superior Court.

II.
Jurisdiction.

The judgment of the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles was entered, without written opinion, on July 31, 1961; Petition for Rehearing was denied, without written opinion on August 11, 1961 by the aforementioned Appellate Department of the Superior Court. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (3).

III.
Questions Presented.

A. Whether the prosecution of the petitioner, who is alleged to have violated a Los Angeles Municipal Code obscenity ordinance (Sec. 41.02(b)* of said Code), wherein the prosecution placed before the jury, over defense objections, motion picture film of less than four minutes (three minutes and forty-five seconds) of petitioner's approximately fifteen minute dance performance, and, by the prosecutions very own statements, the entire case against petitioner is said film (which has no accompanying sound, although said performance was made in tempo to music), constitutes an abrogation of the law as exemplified by *Roth v. United States* and *Alberts v. California*, 354 U. S. 476, procedural and substantive due process of law, and denies the protection of the Constitution, a fair trial, and/or abridges First Amendment freedoms, including the freedom of expression and thought, in contravention of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and the "Freedom of Speech and Press" clauses of the First Amendment to

*All State Statutes, Municipal Ordinances, and State Constitutional Provisions are set out verbatim in Appendix A.

the Constitution of the United States as they are "incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment", *Roth v. United States* and *Alberts v. California, supra*, at 479-480.

B. Whether the prosecution of petitioner, who is alleged to have violated a Los Angeles Municipal Code obscenity ordinance (Sec. 41.02(b) of said Code), wherein the Trial Court denied petitioner her request to present to the jury evidence concerning contemporary community standards pertaining to the obscenity charge made against her, constitutes an abrogation of the law as exemplified by *Roth v. United States* and *Alberts v. Cailfornia, supra*, procedural and substantive due process of law, and denies the protection of the Constitution, a fair trial, and/or abridges First Amendment freedoms, including the freedom of expression and thought, in contravention of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and the "Freedom of Speech and Press" clauses of the First Amendment to the Constitution of the United States as they are "incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment", *Roth v. United States* and *Alberts v. California, supra*, at 479-480.

C. Whether prosecution of petitioner by way of a criminal obscenity ordinance, Los Angeles Municipal Code Section 41.02(b), which prescribes a criminal penalty predicated on absolute, strict criminal liability, constitutes an abrogation of the law as exemplified by *Smith v. California*, 361 U. S. 147, procedural and substantive due process of law, and denies the protection of the Constitution, a fair trial, and/or abridges First Amendement freedoms, including the freedom of expression and thought, in contravention of the

Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and the "Freedom of Speech and Press" clauses of the First Amendment to the Constitution of the United States as they are "incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment", *Roth v. United States* and *Alberts v. California, supra*, at 479-480.

D. Whether prosecution of petitioner under a purported obscenity Ordinance, Section 41.02(b) of the Los Angeles Municipal Code which is manifestly and patently unintelligible, constitutes an abrogation of the law as exemplified by *Winters v. New York*, 333 U. S. 507 at 509-510, procedural and substantive due process of law, and denies the protection of the Constitution, a fair trial, and or abridges First Amendment freedoms, including the freedom of expression and thought, in contravention of the Due Process and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution and the "Freedom of Speech and Press" clauses of the First Amendment to the Constitution of the United States as they are "incorporated in the liberty protected from state action by the Due Process Clause of the Fourteenth Amendment", *Roth v. United States* and *Alberts v. California, supra*, at 479-480.

E. Whether prosecution of petitioner under Los Angeles Municipal Code Ordinance 41.02(b) constitutes a violation of due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution in view of the fact that the prosecution admits that petitioner was engaged in a burlesque performance in a burlesque establishment specifically licensed by the City of Los Angeles for burlesque entertainment and Los Angeles Municipal Code Ordinance 41.02(a) is the ordinance

which purports to impose criminal sanctions for an obscene burlesque performance.

F. Whether petitioner has been denied due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution since petitioner's two co-defendants who were acquitted by the jury, the managers of the establishment duly licensed for the burlesque performance, were charged under Penal Code Section 311, subsection 2 which necessitates that a defendant have a requisite criminal intent to act "lewdly" in order to be found guilty whereas petitioner was charged under Los Angeles Municipal Code Section 41.02(b) which prescribes absolute, strict criminal liability without the requirement of even general intent; furthermore, the fact is uncontroverted by any of the parties, and conceded and admitted by the prosecution, that the owners and managers of the Bamboo Cafe, the licensed burlesque establishment in which petitioner gave her performance, had seen petitioner's performance literally hundres of times before the occasion she gave the very same performance for which she was arrested; the two co-defendants, the managers and owners of said licensed burlesque establishment, knew and had known in detail the performance of petitioner for which she was arrested and convicted.

G. Whether petitioner has been deprived of due process of law and equal protection of the laws under the Fourteenth Amendment to the United States Constitution in view of the acquittals of the co-defendants, Roy Sorge and Frank Sorge, since said acquittals of the Sorges, who had extensive and detailed knowledge of petitioner's dance performance, provide only one rational result concerning whether or not the performance by petitioner was obscene; that rational result is that said performance was *not* obscene, and

hence, the conviction of petitioner is a patently and manifestly inconsistent verdict which cannot be allowed to stand.

H. Whether the refusal of the Court to give requested jury instructions, especially those instructions relating to bias, criminal intent, and the requirement that the proscribed conduct be done "lewdly", constitutes a denial of due process of law and denial of equal protection of the laws under the Fourteenth Amendment to the United States Constitution in view of the fact that the Trial Court not only did not give the requested instructions, but gave no equivalent instructions.

I. Whether the conduct of the prosecutor, including his having many conversations with the wife of one of the jurors who accompanied her husband to Court each day during the trial which began on January 10, 1961, and ended on January 18, 1961, constitutes a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

J. Whether the Trial Court's rulings impeding and stopping the cross-examination of Officer DeCamp constitute a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

K. Whether the Court's refusal to allow the camera used by the Police Officer in taking the motion pictures into evidence constitutes a denial of due process of law under the Fourteenth Amendment to the United States Constitution.

IV.
Raising of Federal Questions Below.

Federal questions were raised even prior to plea. A timely written demurrer [CCTR 5, *et seq.*]* pursuant to Section 1004 of the Penal Code of the State of California was made and argued to the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California. Said demurrer pointed out that the due process clause and equal protection clause of the Fourteenth Amendment to the United States Constitution were violated by the prosecution of petitioner.

At the very earliest possible time, before the jury viewed the film, the Court was asked to scrutinize it. The prosecution had previously stated [CCTR 133:1, *et seq.*] that the prosecution's case did not consist of testimony "but in the film, itself". When the Trial Court refused to view the film before it was shown to the jury to see whether or not it was adequate in length, completeness, and quality to be shown to said jury (said Trial Court refused to consider whether or not there was a proper foundation for allowing the jury to view the film), petitioner pointed out to the Trial Court the applicability of the due process clause of the Fourteenth Amendment to the United States Constitution and that what was occurring was denying the petitioner a fair trial [CCTR 162:2, *et seq.*]. After the prosecution fin-

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*In this petition, CCTR refers to Clerk's Certified Transcript of Record, the Record certified by the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles.

ished its case all defendants, including petitioner, pointed out to the Trial Court that it was a violation under the Fourteenth Amendment to the United States Constitution to force the defendants to defend in an alleged obscenity prosecution wherein less than four minutes of petitioner's performance by way of an inadequate and insufficient motion picture film, without sound, was the entire case of the prosecution since petitioner's performance, itself, was approximately fifteen minutes in length and given in tempo and harmony with music. Petitioner pointed out to the Court that forcing her to defend in such a situation was a violation of both the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution [CCTR 392:25, *et seq.*]. After both sides rested, Federal questions, including the exclusion of evidence pertaining to contemporary community standards, were once again raised before the Trial Court [CCTR 763:3 *et seq.*]. It was pointed out to the Court once again that three minutes and forty-five seconds of petitioner's performance by way of the motion picture film was inadequate as a matter of law to allow the case to go to the jury [CCTR 764:12, *et seq.*]. Petitioner's performance, as aforesaid, was approximately fifteen minutes in length and accompanied by sound and tempo and harmony with the dance. Again, at the time of Motion for New Trial, petitioner raised the due process clause and equal protection clause of the Fourteenth Amendment to the United States Constitution [CCTR 805:18, *et seq.*].

V.
City Ordinances, State Statutes, and State Constitutional Provisions Involved.

(See Appendix A)

The following Penal Code Sections of the State of California are involved: 311, 647 (Subsection 5), 950, 952, 1004, 1181 (Subsection 2, 3, 4, 5, 6 and 7), 1185.

The following Los Angeles Municipal Code Sections (Ordinances) are involved: 11.00(m), 41.00, 41.01.1, 41.02(a), 41.02(b).

Also involved is Article XI, Section 11 of the California Constitution.

VI.
Statement.

On or about October 17, 1960, petitioner was arrested for alleged violation of law which allegedly occurred on or about October 6, 1960. The complaint was executed on October 17, 1960 by the Los Angeles Police Officer who took motion pictures of the petitioner on or about October 6, 1960 for prosecution purposes by turning the camera off and on according to his whim and caprice during petitioner's performance. Said pictures were taken at 4712 Lankershim Boulevard, in the City of Los Angeles, County of Los Angeles, State of California at a time when petitioner was performing in her professional capacity as a dancer in the Bamboo Club which was duly licensed for the type of public entertainment in which the petitioner was professionally engaged. The prosecution has stated and admitted that the entire case against petitioner is the film. This film represents

a total time of less than four minutes (three minutes and forty-five seconds) of petitioner's approximately fifteen minute performance.

The original complaint was couched in two counts. The first count, an alleged violation of Subsection 5 of Penal Code Section 647 was dismissed during the trial. Before this Court in this Petition for Certiorari is the conviction of alleged violation by petitioner of Section 41.02(b) of the Los Angeles Municipal Code.

The two owners of the Bamboo Club were tried at the same time as petitioner. All three defendants were tried as the result of the one performance of petitioner set forth, *supra*. The two owners, Frank Sorge and Roy Sorge, were charged with violation of Subsection 2 of Penal Code Section 311. The Sorges knew the performance of petitioner in minute detail; they had seen the act literally hundreds of times before on or about October 6, 1960; Roy Sorge and Frank Sorge were both found not guilty by the same jury which found petitioner guilty.

The verdicts were rendered on January 18, 1961. On January 20, 1961 petitioner was sentenced to thirty days in jail and a fine of $500 to become an added 50 days in jail if she cannot pay the $500.00, becoming a total of 80 days in jail [CCTR 871:18 *et seq.*]. Petitioner filed in the Trial Court a timely Notice of Appeal to the Appellate Department of the Superior Court of the State of California in and for the County of Los Angeles the very same day that she was sentenced and since that date has been, and is now, free on appeal bond [CCTR 872:2 *et seq.* and Section VII

of the Petition to Apply to the United States Supreme Court for Certiorari or Appeal and Request to Stay Remittitur; said Petition was appropriately filed in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles] Petitioner subsequently filed a timely Statement on Appeal pursuant to California law in the Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles. The judgment of the aforementioned Appellate Department, affirming the Trial Court, was rendered and entered on July 31, 1961 and is a part of the Certified Record before this Court. The Petition for Rehearing in the aforementioned Appellate Department was denied on August 11, 1961. The Petition to Stay the Remittitur of said Appellate Department to the Trial Court pending application to this Court for relief was granted by said Appellate Department on the same day that the Petition for Rehearing was denied. Said Appellate Department is the Court of last resort in the State of California in this matter.

Petitioner filed a timely Demurrer, as aforesaid, in the Trial Court but said Trial Court overruled the Demurrer; petitioner made a timely Motion for a New Trial [CCTR 854:2, *et seq.*], however, said Motion for a New Trial was denied as was the Motion to Arrest Judgment [CCTR 867:3, *et seq.*].

Upon denial of the Petition for Rehearing by the aforementioned Appellate Department of the Superior Court, Petitioner's State remedies were exhausted. Petitioner now presents her timely Petition for Certiorari to this Court.

VII.
Reasons for Granting the Writ.

A. The Entire Case Against Petitioner Is a Motion Picture Film Representing Less Than Four Minutes of Petitioner's Performance; Said Performance Was Approximately Fifteen Minutes in Length; the Mandate Exemplified by Roth v. United States and Alberts v. California, 354 U. S. 476 Has Not Been Observed. This Not Only Has Submitted Petitioner to the Rigors and Burdens of an Unwarranted Prosecution but Countenancing Such Procedure Endangers Other Dancers and Those in Artistic Pursuits, Both in Populous Los Angeles and Throughout Our Country.

In *Roth*, 354 U. S. 476 at 490, it is held, *inter alia*, that

> "The test in each case is the effect of the book, picture or publication CONSIDERED AS A WHOLE, not upon any particular class, but upon all those whom IT IS LIKELY TO REACH. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be JUDGED AS A WHOLE, IN THEIR ENTIRE CONTEXT, AND YOU ARE NOT TO CONSIDER DETACHED OR SEPARATE PORTIONS IN REACHING A CONCLUSION. You judge the circulars, pictures and publications which have been put in evidence by present day standards of the community. You may ask yourselves does it offend the common conscience of the community by present day standards". (Emphasis added.)

In this case, as shown herein, less than four minutes of an approximately fifteen minute performance was shown to the jury and the motion picture which was taken was not taken with any care whatsoever to pro-

duce an authentic reproduction of petitioner's dance performance; hence, the film was woefully inadequate. To cite several of these inadequacies it is pointed out that the lighting was such that the film does not represent what actually took place [CCTR 750:7, *et seq.*]; of course music was, and is, missing so that the jury did not have the benefit of the music while viewing the film. Furthermore, the wording in *Roth* makes it mandatory that before the Jury can determine whether or not this art form, the dance, is obscene it must consider the people "whom it is likely to reach". It is conceded by all parties to this litigation that the performance took place in an establishment licensed by the City of Los Angeles to furnish burlesque entertainment where liquor is sold and the patrons are over twenty-one years of age.

The prosecution has stated explicitly that their case is the film

> "Three minutes 45 seconds—approximately three minutes 45 seconds, give or take a few seconds. That is our case, ladies and gentlemen." [CCTR 775:9, *et seq.*]
>
> ". . . you have only got that four minutes *(sic)* scene to consider." [CCTR 770:25, *et seq.*]

Appropriate objection was made to the introduction of the film into evidence [CCTR 155:17, *et seq.*].

The evidence is insufficient to support the verdict because the film, according to the prosecution itself—the prosecution's entire case, does not present the entire performance of petitioner from even a visual standpoint let alone the fact that the music, in tempo with which petitioner danced during her performance [CCTR 508:19, *et seq.*], was not before the jury. Mr. Justice Harlan in *Roth v. United States, supra*, at page 498 holds that whether or not the matter in question is obscene

> "involves not really an issue of fact but a question of Constitutional JUDGMENT of the most sensitive and delicate kind." (In the *Roth* case JUDGMENT is in italics).

Petitioner suggests that it is manifestly and inherently impossible for even a Court with its background of judicial and legal experience to exercise an intelligent judgment when less than four minutes out of a fifteen minute performance is before it; it follows that a jury, *a fortiori*, made up of lay people are confronted with an impossible task in determining guilt or innocence when the entire matter alleged to be obscene is not placed before it.

Here is a situation in which the police department and the deputy city attorney in charge of obscenity prosecutions joined together for the purpose of prosecution [CCTR 774:8, *et seq.*]. In view of the fact they decided to predicate their entire case on moving pictures, the least they could have done would be to take a motion picture film, inadequate as it might be, of the complete dance. The prosecution told the jury:

> "And this is our case, ladies and gentlemen. It doesn't consist in the testimony of the officer but in the film, itself." [CCTR 133:1, *et seq.*]

Petitioner's performance in the instant case, it is emphasized, took place in an establishment specifically licensed by the City of Los Angeles for burlesque. It is uncontroverted and admitted by the prosecution that petitioner wore the normal costume for one dancing in burlesque [CCTR 337:23, *et seq.*; 577:4, *et seq.*; 636:9, *et seq.*]. Before this Court, as part of the stripper's wardrobe in evidence, Defendant's Exhibit B, is a full-length red dress [CCTR 634:9, *et seq.*]. Petitioner wore said red dress for several minutes during the performance in question. Yet said dress is nowhere to

be seen on the motion picture film which the prosecution has stated is their entire case and which motion picture film allegedly portrays petitioner's performance.

In the case of a book the alleged obscenity is embodied in a form which lends itself to objective analysis. To determine whether a motion picture shown to the public is obscene the trier of fact is entitled to consider the motion picture, the sound, and the setting engaging the effect upon all those it is likely to reach, in short, the motion picture as a whole (*Zenith International Film Corporation v. City of Chicago, Ill.*, 291 F. 2d 785 (1961), and *Roth v. United States* and *Alberts v. California, supra*). In the instant case, there is an art form exemplified by the dance performance of the petitioner involved; said performance was accompanied by music. The prosecution, only interested in a conviction, made no attempt to record the music which accompanied, and was in harmony with, petitioner's performance. Thus, the jury was completely deprived of the presence of the music so that what resulted was a grotesque pantomime. The impression on the human mind of the visual portion of the dance, unaccompanied by music, is profoundly different than said impression when the dance is accompanied by music as was the case in the actual performance wherein petitioner danced in harmony, in tempo with, the music. The determination of whether or not a dance performance is obscene is difficult enough even when said performance is faithfully duplicated, including the duplication of the correct color involved: the color of the attire of the dancer, the color of the surroundings, and the variation in color (change from ordinary white light) projected upon the dancer during the performance; in the instant case, putting aside for the moment the important color and sound (music) considerations, the prosecution saw to it that there was not even an at-

tempt to get faithful "black and white" photographic results so that an intelligent rational analysis of the dance performance could be made; yet the prosecution's entire case is based on the incomplete and inadequate film.

Compared with the case of a book or motion picture it is important, *a fortiori*, in the case of the dance that the entire dance performance be before the trier of fact, since the form of expression does not include the use of language, but is, rather, an art form involving movement of the body of the performer with a consequent result that there are manifold and myriad interpretations and impressions upon the observer due to the combined effect of the dance, the music, and the lighting. As a consequence, and the fact that the performance did not involve the use of language, the determination of whether or not the performance was obscene necessitates the invocation of particularly delicate judgment. Thus, the precious freedoms of thought and expression guaranteed against State action by the First Amendment by way of the Fourteenth Amendment to the Constitution of the United States become the prey of irrationality here unless the complete dance is before the jury. This Court has held that freedom of the stage is

> "within the free speech and free press guaranty of the First and Fourteenth Amendments"

in *Superior Films v. Dept. of Education*, 346 U. S. 587 at 589 which cites *Joseph Burstyn, Inc. v. Wilson*, 343 U. S. 495 at 502.

In the instant case, as aforesaid, the explicit purpose of the taking of the inadequate film was for prosecution [CCTR 272:2, *et seq.*: 279:10, *et seq.*], so that whatever analysis might have been made of the performance, said analysis became impossible due to the prosecution's

"editing" of the incomplete film as it was being taken (said "editing" is completely distinct from what editing may have taken place in the Police Film Laboratory) by turning the motion picture camera off and on in accordance with what the Police Officer operating the camera wanted photographed. The prosecution arbitrarily and capriciously determined what would be filmed. The Trial Court summarily limited the cross-examination of the very police officer who arbitrarily decided what would be photographed and what would not [CCTR 309:5, *et seq.*] and would not allow the camera used into evidence [CCTR 595:15, *et seq.*; 598:8, *et seq.*]. The jury during its deliberations exhibited marked interest in the camera [CCTR 845:3, *et seq.*; 846:11, *et seq.*].

Even the prosecution agreed that the attire worn by petitioner during her performance was correct:

> We are not complaining about the clothing which she was wearing, but the manner in which she acted [CCTR 636:10, *et seq.*].

Nevertheless, none of the film, taken for purposes of prosecution, shows the long red dress which petitioner wore during part of the performance [see Stripper's Wardrobe, Petitioner's B, in Evidence]. Rather than obtain a motion picture of the dance encompassing the full length of the performance, film paid for by the taxpayers of the City of Los Angeles for police work was used in taking idle freeway scenes and other idle pictures with no purpose except to expose the film subsequent to leaving the Bamboo Club after taking less than four minutes of petitioner's performance on film. This was not even a situation in which the officer did not have film with him other than the film which was used to take the motion pictures. An entire 100 foot roll of film was used in taking purposeless pictures

[CCTR 241:7, *et seq.*] immediately following the filming at the Bamboo Club. The extent of the Los Angeles Police Department photographic capability may be seen from the fact that a Police Officer testified that said Los Angeles Police Department buys motion picture film in 1200 foot rolls [CCTR 702:16, *et seq.*]. With a minimum of diligence the entire performance of petitioner could have been filmed if the prosecution had desired the trier of fact to have film of the entire performance.

B. The Refusal of the Trial Court to Allow Petitioner to Put Before the Trier of Fact Evidence Concerning the State of Contemporary Community Standards Contravenes the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution—and the Mandate of This Court in Roth v. United States and Alberts v. California, Supra.

Petitioner requested, to no avail, that the Trial Court allow the jury to view burlesque in the Los Angeles area [CCTR 604:5, *et seq.*] so that an intelligent appraisal could be made by the jury of petitioner's burlesque performance in view of contemporary community standards. It is of extreme importance to note that it was the performance which the jury was to judge. The incomplete motion picture film, the prosecution's entire case, is mere evidence which is insufficient, in any event, to support the verdict in view of *Roth, supra.*

The Trial Court would not allow the implementation of the mandate that judgment must be made by considering "present day standards of the community", *Roth v. U. S., supra*, at 490. The administration of justice in this sensitive field, which involves the precious First Amendment freedoms, including freedom of

expression and freedom of thought, requires allowing the jury to have evidence as to what contemporary community standards are to determine correctly what the "common conscience of the community" is. In the instant case, petitioner wanted the jury to have the benefit also of an expert witness's testimony. The Court, however, stated that, in any event, it would not allow his testimony [CCTR 606:23, *et seq.*].

In a recent case, *Zenith International Film Corporation v. City of Chicago*, 291 F. 2d 785, cited *supra*, the Court of Appeals for the Seventh Circuit held, at page 789:

> "Further, there was NO OPPORTUNITY before the censorship board or before the Mayor or his delegate for Zenith TO SHOW THAT ITS FILM DID NOT OFFEND CONTEMPORARY COMMUNITY STANDARDS. Again, the Supreme Court has set the criterion for obscenity not at an individual, subjective level but at the benchmark of a general, objective determination whether a work appeals to the prurient interests of the community at large. Roth v. United States 1957, 354 U. S. 476, 489, 490, 77 S. Ct. 1304. There was never an opportunity for those responsible city officials to make their judgment aided by movie reviews or other evidence Zenith might marshal in support of its application." (Emphasis added).

Refusal to allow in evidence evidence of contemporary community standards, *a fortiori*, in the case of petitioner violates due process of law since petitioner has been charged and convicted of crime with its attendant penal results involving a jail sentence whereas in *Zenith* the penalty for exhibiting the picture without the requisite permit is monetary (*Zenith International Film Corp. v. City of Chicago, Ill., supra*, at 788).

C. Prosecution of Petitioner and Potential Prosecution of Untold Numbers of Others Under Los Angeles Municipal Code Section 41.02(b), Which Is Vague, Uncertain, Incomprehensible, and Unintelligible, and Imposes Absolute, Strict Crimin... ...ability Upon Its Face, and as Construed and Applied, Violates Procedural and Substantive Due Process of Law and Denies the Protection of the Constitution and/or Abridges First Amendment Freedoms, Including the Freedom of Expression and Thought, in Contravention of the "Due Process" and "Equal Protection" Clauses of the Fourteenth Amendment to the United States Constitution and the "Freedom of Speech and Press" Clauses of the First Amendment to the Constitution of the United States Encompassed by the Fourteenth Amendment to the United States Constitution.

The two other defendants, Roy Sorge and Frank Sorge, tried at the same time as petitioner and before the same jury as petitioner, were acquitted; however, the Sorges were not charged under Section 41.02 of the Los Angeles Municipal Code, either Section 41.02(a) or Section 41.02(b), but rather were charged with violation of subsection 2 of Penal Code Section 311, a state statute, part of the general law of the State of California.

Petitioner has been charged with violation of Section 41.02(b), as aforesaid. Analysis of this statute shows that it is manifestly vague, uncertain, incomprehensible, and unintelligible. No other conclusion is possible. Because of the language and punctuation in the purported ordinance, the following should make sense, but does not:

> "No person shall exhibit in the presentation of any obscene, indecent or lewd play or representation."

The foregoing does not make sense, is incomprehensible, and cannot be understood. The ordinance, purporting to be a criminal statute, and providing for a criminal penalty (Los Angeles Municipal Code Section 41.00(m), set forth in Appendix to this Petition, under which petitioner was sentenced) does not reveal what it is that may not be exhibited. Does it mean that the owners of a licensed burlesque establishment, such as the Sorges, the co-defendants of petitioner who were acquitted, may not exhibit, sponsor, or present an obscene "play or representation"? Or does it mean that exhibition of offensive inanimate objects is proscribed? Or does it mean that one shall not exhibit one's self? Or what does it mean? Very succinctly stated, the ordinance does not disclose what it is that shall not be exhibited. Application of the most rudimentary English makes no other conclusion possible.

It is well established that a statute or ordinance which is vague, uncertain, incomprehensible, or unintelligible is unconstitutional and a violation of due process if anyone is prosecuted under it (*Winters v. New York*, 333 U. S. 507, 509-10, 515). Petitioner is now under sentence as a result of such a prosecution. Granting this Petition will be a step towards assurance that no one else will become burdened with the necessity of providing a defense to 41.02(b) with all of the consequent burdens and rigors which must be endured when one becomes subject to criminal prosecution; apart from the fact that granting the Petition will bulwark the freedom of expression and thought protected by the First Amendment from illegal State action by way of the Fourteenth Amendment, and municipalities in the rest of the country will give greater care in drafting ordinances involving fundamental rights, the many millions of individuals subject to the Los Angeles Municipal Code will be protected from unjustified prosecution under Section 41.02(b).

The words "obscene", "indecent", and "lewd" are essentially synonymous and really are different ways of saying the same thing. Los Angeles Municipal Code Section 41.02(b) does not purport to proscribe anything that is not proscribed by subsection 41.02(a). Section 41.02(b) merely includes within its language the word "lewd" which, in legal effect, adds nothing by way of proscription that is not proscribed in 41.02(a) since "obscene" and "indecent" are in both (a) and (b). Section 41.02(a) does not have the word "exhibit" within its language, but as shown, *supra*, the word "exhibit" makes (b) unintelligible. The word "perform" which is present in (b) certainly is included in the word "participate" which is present in both (a) and (b). The word "representation" is put in the alternative with the word "play" in (b). The word "representation", a broad word which has so many possible meanings and interpretations, so that for the purposes of a penal statute it has no meaning, contributes appreciably to making the purported ordinance unconstitutional, as applied to petitioner, and unconstitutional and void on its face (Webster's New International Dictionary, 2nd Ed.). If "representation" is to have any meaning at all it takes on said meaning from the word "play". Petitioner's performance was a dance not a "play".

In 41.02(a) is incorporated, *inter alia*, "SHOW" and "ENTERTAINMENT". (Emphasis added). In the instant case, there is no question but what the dance by petitioner which was the subject of the trial through the medium of the inadequate film was a "show" put on for "entertainment" to an adult audence in a burlesque establishment duly licensed for said "show" and "entertainment". Thus, apart from the invalidity of 41.02(b) on its face, there is the added fact that 41.02(b) does not and could not ever apply to the petitioner. Section 41.00 unmistakably

sets forth that the word "show" shall mean and include a burlesque show. The English language could not make it any clearer.

In this case, the Los Angeles City Attorney's office for reasons best known to that office, saw fit not to charge petitioner with violation of Section 41.02(a) although it is clear from the statutory pattern of the Los Angeles Municipal Code itself that the alleged facts in this case are purportedly covered by Section 41.02(a). In this regard it is very pertinent to note that the other defendants, Roy Sorge and Frank Sorge, the employers of petitioner, who were acquitted, were not charged with violation of Section 41.02(a) but rather with violation of subsection 2 of Penal Code Section 311. The reason the prosecution proceeded against the Sorges by way of the Penal Code instead of by way of the Los Angeles Municipal Code is because the prosecution had, and have, grave doubts as to the constitutionality of Section 41.02, due to the fact that said section prescribes a criminal penalty predicated upon absolute, strict criminal liability. In *Smith v. California*, 361 U. S. 147, this Court found Section 41.01.1 of the Los Angeles Municipal Code, a sister Section to 41.02(a), to be invalid and prosecution under that section to be a violation of due process of law because on its face said section did not require a *mens rea*. Furthermore, the prosecution realized that the general law of the state in the form of Penal Code Section 311 has occupied the field in which Section 41.02 of the Los Angeles Municipal Code purports to operate, and hence, the latter is of no force and has no legal effect (Constitution of the State of California, Article XI, Section 11). Thus, prosecution of petitioner under Section 41.02(b) constitutes an arbitrary discrimination and an abrogation of equal protection of the laws and denial of due process

of law under the Fourteenth Amendment to the United States Constitution. In *Tolman v. Underhill*, 39 Cal. 2d 708, the Supreme Court of the State of California states:

> "Where the Legislature has adopted statutes governing a particular subject matter, its intent with regard to occupying the field to the exclusion of all local regulation is not to be measured alone by the language used but by the whole purpose and scope of the legislative scheme."

Certainly the very complete statutory pattern of Penal Code 311 leaves no question but that the general law of the State of California as prescribed by the State Legislature has occupied the legislative field with respect to obscenity. Burlesque which, as aforesaid, was duly licensed in the Bamboo Club, involves dancing in which the female form is very scantily clad so that there is extensive exposure of the dancer's body. Subsection 1 of Penal Code 311 encompasses exposure of the human form within its purview; also, Chapter 8 of Title 9 of the Penal Code encompasses "OBSCENE EXHIBITIONS" as may be seen from the title of said chapter; Penal Code 311 encompasses "LEWD OR OBSCENE CONDUCT;" as may be seen from the heading given said Penal Code 311. "LEWD OR OBSCENE CONDUCT;" appears at the beginning of said heading.

It is submitted that the other defendants, Roy Sorge and Frank Sorge, the employers of petitioner who were acquitted, were prosecuted by way of subsection 2 of Penal Code Section 311 not only because of *Smith v. California*, *supra*, and Article XI, Section 11, but also because of the law set forth in *People v. Weppler*, 78 Cal. App. 2d 959. This case requires not only that the prosecution show that the proscribed act was done, but, further, that the defendant acted lewdly in doing said

act. The Court did so instruct with respect to Roy Sorge and Frank Sorge, the defendants who were acquitted since they were prosecuted under Penal Code Section 311, subsection 2. However, the Court gave no instruction to the jury requiring the jury to find that the petitioner acted lewdly in order to convict her or any instruction concerning the necessity that the jury find a requisite criminal intent before a conviction could be brought in although both such instructions were requested.

Thus, it is seen, that in the prosecution of petitioner an arbitrary discrimination constituting a denial of equal protection of the laws and denial of due process of law within the contemplation of the Fourteenth Amendment to the United States Constitution has occurred.

D. In View of the Acquittal of the Co-Defendants, Roy Sorge and Frank Sorge, the Jury Found the Performance of Petitioner Not to Be Obscene, and Hence, the Conviction of Petitioner Is Patently and Manifestly Inconsistent Constituting a Denial of Due Process of Law and Equal Protection of the Laws Within the Contemplation of the Fourteenth Amendment to the United States Constitution.

There is no question in this case but that the alleged criminal liability of Frank Sorge and Roy Sorge was derivative; that is, the Sorge brothers were accused of knowing that the act was lewd and allowing this allegedly lewd act to take place in their establishment. This is the charge which was made against them under subsection 2 of Penal Code 311. Roy Sorge and Frank Sorge had seen the dance of petitioner many, many times and knew its contents in detail [CCTR 779:10, *et seq.*, 550:22, *et seq.*, 548:2, *et seq.*]. It was conceded by all parties concerned, including the prosecution [CCTR 779:10, *et seq.*], that each of the

Sorges had seen petitioner's act literally hundreds of times and that the Sorges had employed her previous to the employment which resulted in the matter now before this Court. All parties were in agreement that the performance by petitioner on the night in question was the same that it had been on the many, many other occasions the Sorges had witnessed per performance. Thus, the decision involved only the dance of petitioner on the night in question at the Bamboo Club since there was no question whatsoever about the knowledge of the Sorges as to the contents of petitioner's dance.

The trial Court itself stated that it did not understand the verdicts at the time they were rendered [CCTR 850:24, *et seq.*].

For the conviction and judgment to be allowed to stand against the petitioner in view of the acquittal of Roy Sorge and Frank Sorge in view of their conceded knowledge of the performance of petitioner in great detail is unjust and, as aforesaid, unconstitutional and a violation of due process of law and equal protection of the laws. Verdicts of acquittal for Roy Sorge and Frank Sorge cannot be rationally reconciled with a verdict of guilty as to petitioner.

E. The Conduct of the Prosecutor Constituted a Denial of Due Process of Law Which Conduct by an Officer of the Court Cannot Be Tolerated in the United States of America.

To cite a few instances, the prosecutor did not deny having many conversations with the wife of one of the jurors and commented in this regard:

> We discussed the birds singing in the trees, counsel [CCTR 868:12, *et seq.*].

He displayed a book entitled "Crime and the Sexual Psychopath" to the jury [CCTR 107:3, *et seq.*], and baselessly accused petitioner of giving signals during testimony [CCTR 505:10, *et seq.*].

VIII.
Conclusion.

The petitioner was a professional dancer working in that capacity in an establishment licensed for the showing of her performance by the City of Los Angeles on the night her dance was incompletely and inadequately filmed. She looks to this Court to protect her from the effects of the illegal prosecution and unjust conviction based upon the incomplete and inadequate motion picture film taken of her dance.

As the result of the conviction, petitioner, who has not had any previous involvement with the law, is under a severe jail sentence, and fine.

The Constitutional guarantees and First Amendment freedoms of the individual American are protected from illegal State action, such as prosecution here under Los Angeles Municipal Code Section 41.02(b), by the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution. In upholding the principles of a fair trial, the right to due process of law and equal protection of the laws for each individual who comes before this Court regardless of his or her station in life, other, unnamed Americans are protected from similar illegal prosecution and we underline our faith in our Free Institutions to the entire world.

IX.
Prayer.

For the foregoing reasons, petitioner prays that this Court invoke the individual and joint judicial wisdom with which it has been endowed and grant this Petition for a Writ of Certiorari.

Respectfully submitted,

I. A. KANAREK,
REX H. MINTER,
Attorneys for Petitioner.

Dated: November 3, 1961.

APPENDIX A.

CITY ORDINANCES, STATE STATUTES AND STATE CONSTITUTIONAL PROVISIONS.

CITY ORDINANCES.

Los Angeles Municipal Code Section 11.00 (m) Violations, a Misdemeanor.

It shall be unlawful for any person to violate any provision or to fail to comply with any of the requirements of this Code. Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this Code, shall be guilty of a misdemeanor. Any person convicted of a misdemeanor under the provisons of this Code, unless provision is otherwise herein made, shall be punishable by a fine of not more than $500.00 or by imprisonment in the City Jail for a period of not more than six months or by both such fine and imprisonment. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provison of this Code is committed, continued, or permitted by such person and shall be punishable accordingly. In addition to the penalties hereinabove provided, any conditon caused or permitted to exist in violation of any of the provisions of this Code shall be deemed a public nuisance and may be, by this City, summarily abated as such, and each day that such condition continues shall be regarded as a new and separate offense.

Los Angeles Municipal Code Section 41.00. Definitions:

For the purpose of this article, the following words and phrases are defined, and shall be construed as hereinafter set out, unless it shall be apparent from the context that they have a different meaning:

"SOUND AMPLIFYING SYSTEM," shall mean and include any system of electrical hook-up or connection, loud speaker system or equipment, sound amplifying system and any apparatus, equipment, device, instrument or machine designed for or intended to be used for the purpose of amplifying the sound or increasing the volume of the human voice, musical tone, vibration, or sound wave of any kind from whatever source the same may have originated, initiated or been created.

"SHOW" shall mean and include any burlesque show, stage show, theatrical performance, drama, play tableaux, prologue, stage exhibition, motion picture show or cinema.

Los Angeles Municipal Code Section 41.01.1 Indecent Writings, Etc.—Possession Prohibited:

It shall be unlawful for any person to have in his possession any obscene or indecent writing, book, pamphlet, picture, photograph, drawing, figure, motion picture film, phonograph recording, wire recording or transcription of any kind in any of the following places:

1. In any school, school-grounds, public park or playground or in any public place, grounds, street or

way within 300 yards of any school, park or playground;

2. In any place of business where ice-cream, soft drinks, candy, food, school supplies, magazines, books, pamphlets, papers, pictures or postcards are sold or kept for sale;

3. In any toilet or restroom open to the public;

4. In any poolroom or billiard parlor, or in any place where alcoholic liquor is sold or offered for sale to the public;

5. In any place where phonograph records, photographs, motion pictures, or transcriptions of any kind are made, used, maintained, sold or exhibited.

Los Angeles Municipal Code Section 41.02.
Indecent Shows:

(a) No person, either as owner, manager, producer, director, actor or agent, or who acts in any other capacity, shall give, direct, present or participate in any obscene, indecent, immoral, or impure drama, play, exhibition, show, or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show, or entertainment.

(b) No person shall exhibit or perform, or participate in the presentation of any obscene, indecent or lewd play or representation.

CALIFORNIA STATUTES.

California Penal Code Section 311.

LEWD OR OBSCENE CONDUCT; INDECENT EXPOSURE; OBSCENE WRITINGS, PUBLICATIONS, PICTURES, ETC.; OBSCENE SONGS AND REPRODUCTIONS THEREOF; PUNISHMENT; APPLICATION TO ACTORS.

Every person who wilfully and LEWDLY,* either:

1. Exposes his person, or the private parts thereof, in any public place, or in any place where there are present other persons to be offended or annoyed thereby; or,

2. Procures, counsels, or assists any person so to expose himself or to take part in any model artist exhibition, or to make any other exhibition of himself to public view, or the view of any number of persons, such as is offensive to decency, or is adopted to excite to vicious or lewd thoughts or acts; or,

3. Writes, composes, stereotypes, prints, publishes, sells, distributes, keeps for sale, or exhibits any obscene or indecent writing, paper, or book; or designs, copies, draws, engraves, paints, or otherwise prepares any obscene or indecent picture or print; or molds, cuts, casts, or otherwise makes any obscene or indecent figure; or,

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper book, picture, print or figure; or,

5. Produces, prepares, manufactures, sells, distributes, keeps for sale, exhibits, buys, rents, operates, uses, keeps, or maintains recordings, transcriptions, or mechanical, chemical, or electrical reproductions, or any other articles, equipment, machines, or materials, used

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*Emphasis added.

or intended to be used in producing or reproducing any lewd or obscene song, ballad, or other words, whether spoken or sung; or,

6. Sings or speaks any lewd or obscene song, ballad, or other words, in any public place, or in any place where there are presons present to be annoyed thereby, is guilty of a misdemeanor.

Upon the second and each subsequent conviction under subdivision 1 of this section, or upon a first conviction under subdivision 1 of this section after a previous conviction under Section 288 of this code, every person so convicted is guilty of a felony, and is punishable by imprisonment in the state prison for not less than one year.

The provision of subdivision 6 of this section shall not apply to any person participating in violation thereof only as an actor, unless and until the proper court shall have passed upon the matter and found the actor to have violated the said subdivision 6 of this section, except where after a complaint has been filed against the owner, manager, producer or director charging a violation of said subdivision 6 of this section, and pending the determination thereof an actor or actress utters the particular word or words complained against or other word or words of the same or similar import, in connection with such performance, act, play, drama, exhibition or entertainment.

California Penal Code Section 647, Subsection 5.

VAGRANCY; DEFINITIONS; PUNISHMENT

1. . . . 2. . . . 3. . . . 4. . . .

5. Every lewd or dissolute person, or every person who loiters in or about public toilets in public parks; or 6. . . ., 7. . . ., 8. . . ., 9. . . ., 10. . . ., 11. . . ., 12. . . .

Is a vagrant, and is punishable by a fine of not exceeding five hundred dollars ($500), or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment.

California Penal Code Section 950.

ACCUSATORY PLEADING; TITLE OF ACTION; STATEMENT OF OFFENSE.

The accusatory pleading must contain:

1. The title of the action, specifying the name of the court to which the same is presented, and the names of the parties;

2. A statement of the public offense or offenses charged therein.

California Penal Code Section 952.

STATEMENT OF OFFENSE.

In charging an offense, each count shall contain, and shall be sufficient if it contains in substance, a statement that the accused has committed some public offense therein specified. Such statement may be made in ordinary and concise language without any technical averments or any allegations of matter not essential to be proved. It may be in the words of the enactment describing the offense of which he is accused. In charging theft it shall be sufficient to allege that the defendant unlawfully took the labor or property of another.

California Penal Code Section 1004.

DEMURRER: GROUNDS.

The defendant may demur to the accusatory pleading at any time prior to the entry of a plea, when it appears upon the face thereof either:

1. If an indictment, that the grand jury by which it was found had no legal authority to inquire into the offense charged, or, if an information or complaint that the court has no jurisdiction of the offense charged therein;

2. That it does not substantially conform to the provisions of Sections 950 and 952, and also Section 951 in the case of an indictment or information;

3. That more than one offense is charged, except as provided in Section 954;

4. That the facts stated do not constitute a public offense;

5. That it contains matter which, if true, would constitute a legal justification or excuse the offense charged, or other legal bar to the prosecution.

California Penal Code Section 1181, Subsections 2, 3, 4, 5, 6 and 7.

GROUNDS; MODIFICATION OF VERDICT, FINDING, OR JUDGMENT TO CONFORM TO EVIDENCE; AFFIDAVITS AS TO NEWLY DISCOVERED EVIDENCE; POSTPONEMENT TO PROCURE AFFIDAVITS.

When a verdict has been rendered or a finding made against the defendant, the court may, upon his application, grant a new trial, in the following cases only:

1. . . .

2. When the jury has received any evidence out of court, other than that resulting from a view of the premises or of personal property;

3. When the jury has separated without leave of the court after retiring to deliberate upon their verdict, or been guilty of any misconduct by which a fair and due consideration of the case has been prevented;

4. When the verdict has been decided by lot, or by any means other than a fair expression of opinion on the part of all the jurors;

5. When the court has misdirected the jury in a matter of law, or has erred in the decision of any question of law arising during the course of the trial, and when the district attorney or other counsel prosecuting the case has been guilty of prejudicial misconduct during the trial thereof before a jury;

6. When the verdict or finding is contrary to law or evidence, but if the evidence shows the defendant to be not guilty of the degree of the crime of which he was convicted, but guilty of a lesser degree thereof, or of a lesser crime included therein, the court may modify the verdict finding or judgment accordingly without granting or ordering a new tiral, and this power shall extend to any court to which the cause may be appealed;

7. When the verdict or finding is contrary to law or evidence, but in any case wherein authority is vested by statute in the trial court or jury to recommend or determine as a part of its verdict or finding the punishment to be imposed, the court may modify such verdict or finding by imposing the lesser punishment without granting or ordering a new trial, and this power shall extend to any court to which the case may be appealed.

8. . . .

California Penal Code Section 1185.

MOTION; DEFINITION; DEFECTS AUTHORIZING MOTION; TIME; ENTRY OF ORDER.

A motion in arrest of judgment is an application on the part of the defendant that no judgment be rendered on a plea, finding, or verdict of guilty, or on a finding or verdict against the defendant, on a plea of a former conviction, former acquittal or once in jeopardy. It may be founded on any of the defects in the accusatory pleading mentioned in Section 1004, unless the objection has been waived by a failure to demur, and must be made and determined before the judgment is pronounced. When determined, the order must be immediately entered in the minutes.

CALIFORNIA CONSTITUTION.

Article XI, Section 11.

11. COUNTY, TOWNSHIP, AND MUNICIPAL POLICE POWERS.

Sec. 11. Any county, city, town, or township may make and enforce within its limits all such local, police, sanitary and other regulations as are not in conflict with general laws.

APPENDIX B.
JUDGMENTS BELOW.

1. Judgment of Trial Court [CC TR 871] Rendered on January 20, 1961.

Defendant is sentenced to pay a fine in the sum of $500.00 or to serve 50 days in the city jail, and in addition thereto, to serve 30 days in the city jail. If the fine be not paid the time will be ordered to run consecutively. On the fine there is a penalty assessment, I believe, in the sum of five percent of the total that must be paid also.

2. Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles [CCTR 66] Rendered and Entered on July 31, 1961.

This cause having been argued and submitted and fully considered, judgment is ordered as follows:

It is ordered and adjudged that the judgment and order denying motion for new trial made and entered in the Municipal Court of the Los Angeles Judicial District, County of Los Angeles, State of California, in the above entitled cause be and the same are hereby affirmed. Appeal from order denying motion in arrest of judgment and denial of request to set aside verdict is dismissed.

3. Judgment of Appellate Department of the Superior Court of the State of California, in and for the County of Los Angeles [CCTR 67] Rendered and Entered on August 11, 1961 in Connection With Petition for Rehearing

The petition of appellant for a rehearing after judgment of this court on appeal in the above-entitled case having been filed and having been duly considered, said petition is hereby denied.